INTERIOR BOARD OF INDIAN APPEALS

Estates of Cecelia Smith Vergote (Borger), Morris A. (K.) Charles
and Caroline J. Charles (Brendale)

5 IBIA 96 (05/21/1976)

Also published at 83 Interior Decisions 209

Judicial review of this case:
Dismissed, *Confederated Tribes & Bands of the Yakima Indian Nation v. Kleppe*, No. C-76-199 (E.D. Wash. May 27, 1977)

Earlier judicial case:
Stipulated remand, *Philip Brendale, as Executor of the Estate of Caroline B. Charles, Deceased v. United States*, Civil Action No. C-74-21 (E.D. Wash. June 28, 1974)

Related Board cases:
3 IBIA 56
3 IBIA 68
3 IBIA 91

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ARLINGTON, VA 22203

ESTATES OF CECELIA SMITH VERGOTE (BORGER),

MORRIS A. (K.) CHARLES AND CAROLINE J. CHARLES (BRENDALE)

IBIA 76-21 Decided May 21, 1976

IBIA 76-22

Appeal from an Administrative Law Judge's order determining compensation to be paid by the Yakima Tribe for the taking of an undivided one-half interest in estate land subject to the Act of August 9, 1946, 60 Stat. 968, as amended by the Act of December 31, 1970, 84 Stat. 1874.

Modified.

1. Indian Lands: Tribal Rights in Allotted Lands--Indian Probate: Yakima Tribes: Generally

   Absent regulations requiring otherwise the most equitable valuation date would be the date the Tribe elects to purchase

the property of a noneligible heir or devisee.

2. Indian Lands: Tribal Rights in Allotted Lands--Indian Probate: Yakima Tribes: Valuation Reports

The Board is not bound by the Bureau of Indian Affairs' appraisal, report and findings contained therein. Instead, the Board will give consideration to the complete record, including the BIA appraisal, report and findings in arriving at its findings and determination.

APPEARANCES: James B. Hovis, counsel for appellant, Yakima Tribe; Arthur W. Kirschenmann, counsel for appellant, Philip Brendale.

OPINION BY BOARD MEMBER HORTON

I. Background

Under the authority of the Act of August 9, 1946, 60 Stat. 968 (25 U.S.C. § 607 (1970)), as amended by the Act of December 31,

1970, 84 Stat. 1874, the Yakima Tribe is entitled to acquire any interest in trust or restricted land within the Yakima Reservation which is either devised or descends to a person who is not an enrolled member of the Yakima Tribe with one-fourth degree or more blood of such tribe. By virtue of the 1970 Amendment, the foregoing statute further provides that if Yakima trust lands inherited by a noneligible heir as previously defined are desired by the Yakima Tribe, the heir who is to be preempted by the Tribe's election must be compensated by the fair market value of the property taken by the Tribe as determined by the Secretary of the Interior after an appraisal; otherwise, the Tribe may not take the property. Prior to the 1970 Amendment, the Yakima Tribe was not required to compensate noneligible heirs (persons not enrolled in the Yakima Tribe or enrollees with less than one-fourth degree Yakima blood) in order to receive their inherited trust lands.

By order dated September 17, 1975, Administrative Law Judge Robert C. Snashall directed that the Yakima Tribe compensate Philip Brendale, an enrolled Cowlitz Indian and sole heir of an undivided one-half interest in Yakima Allotment 124-4244, consisting of 160 acres allotted to Mary Charles, deceased, by the sum of $40,000, plus interest, for the Tribe's election to acquire Philip Brendale's 80-acre interest in such allotment.

Philip Brendale and the Yakima Tribe filed separate appeals from the above order which were docketed by the Board on December 5, 1975.

Three estates have been consolidated in this controversy. Together they have produced a complicated probate record dating from 1958 which is detailed through September 1974, in three prior decisions of the Board, viz., Estate of Cecelia Smith (Borger), Yakima Allottee No. 4161, Deceased, 3 IBIA 56, 81 I.D. 511 (1974); Estate of Morris A. (K.) Charles, Yakima Allottee No. 4247, Deceased, 3 IBIA 68, 81 I.D. 517 (1974); and Estate of Caroline J. Charles (Brendale), Yakima Allottee No. 4240, Deceased, 3 IBIA 91, 81 I.D. 505 (1974). Briefly summarized, these three opinions and the records upon which they are based disclose the following sequence of events pertinent to this appeal:

Cecelia Smith and Morris Charles, a/k/a Morris A. (K.) Charles, were the children of Mary Charles, deceased Yakima Allottee No. 4244, each of whom inherited a one-fourth interest in her allotment described as the SW 1/4 sec. 8, T. 7 N., R. 13 E., Willamette Meridian, Yakima County, Washington, containing 160 acres, hereafter described as the Mary Charles Allotment.

Cecelia Smith died in 1958 and by her will left her one-fourth interest in the Mary Charles Allotment in equal shares to the daughters of her brother, Morris Charles, to wit: Caroline B. Charles and Mary (Andle) Andal, who each thereby acquired a one-eighth interest in the Mary Charles Allotment. Upon approval of Cecelia's will on May 15, 1959, it was determined that under the 1946 Act, supra, Caroline B. Charles was eligible to receive her interest as an enrolled member of the Yakima Tribe possessing at least one-fourth degree Yakima blood, whereas Mary Andal was found to be ineligible to receive her one-eighth interest. Accordingly, the interest sought to be devised to Mary Andal was distributed as intestate property to her father, Morris Charles, Cecelia's eligible heir at law by virtue of the 1946 Act, vesting in him an additional one-eighth interest in the Mary Charles Allotment and bringing his total interest therein to three-eighths.

Morris Charles died testate on November 23, 1964. His will devised all of his property to his daughter, Caroline, which, if approved, meant that she would possess the full one-half interest in the Mary Charles Allotment (one-eighth acquired by devise from Cecelia Smith and three-eighths acquired by devise from Morris Charles).

On April 20, 1964, however, prior to Morris Charles' death, the Yakima Tribal Enrollment Committee issued a ruling that Caroline was incorrectly enrolled as one-fourth Yakima and found that she was only one-eighth Yakima. The Examiner of Inheritance in the Morris Charles estate (subsequently Administrative Law Judge), the late R. J. Montgomery, inquired of the Superintendent of the Yakima Indian Agency on August 19, 1966, regarding the eligibility of Caroline Charles to inherit Yakima trust land. By response dated August 23, 1966, the Superintendent certified to Judge Montgomery that Caroline was not eligible under the 1946 Act to inherit Yakima allotments.

Judge Montgomery conducted a hearing in the Morris Charles estate on October 17, 1966. Because Caroline Charles had instituted an appeal regarding her designation as only one-eighth Yakima, her attorney, Arthur Kirschenmann, who represents Philip Brendale in this appeal, submitted a written request to Judge Montgomery on October 24, 1966, suggesting that the order determining heirs in the Morris Charles estate await the result of Caroline's appeal concerning her blood quantum. By response dated October 28, 1966, Judge Montgomery granted Mr. Kirschenmann's request.

It was not until April 11, 1969, that a final Departmental decision was rendered on the issue of Caroline's tribal blood.

The Secretary affirmed the August 6, 1968, decision of the Commissioner of Indian Affairs which held, inter alia, that Caroline had been incorrectly enrolled as one-fourth Yakima in 1956 and that by her own application for enrollment she had classified herself as one-eighth Yakima.

The Secretary's April 11, 1969, decision was addressed to Mr. Kirschenmann. The record indicates that Judge Montgomery did not learn of the Department's disposition of the blood controversy until March 24, 1972. One week later, on March 31, 1972, Judge Montgomery entered his order determining heirs in the Morris Charles estate. In light of the December 31, 1970 Amendment to the Act of 1946, Caroline Charles was declared eligible to receive the interests devised her by Morris Charles, subject to a statutory right in the Yakima Tribe to purchase the property at its fair market value. But for the 1970 Amendment, which was expressly made applicable to all pending probate cases as well as future cases, Judge Montgomery would have been required to rule that all of the trust property devised to Caroline Charles would pass to the Tribe, with the United States as trustee, without any compensation due her. 1/

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1/ The Yakima Tribe attacks the constitutionality of the Act of December 31, 1970, supra, on grounds that the retrospective operation of the statute impairs the property rights of the Tribe which allegedly vested as of Morris Charles' death in 1964 (Opening Brief of Appellant, Yakima Tribe, pp. 2, 9, 10, 17.) Since the Morris Charles estate was technically open on December 31, 1970, no final

On May 12, 1972, Judge Montgomery issued a Supplemental Order of Distribution in the estate of Morris Charles wherein he made a finding that the Yakima Tribe had elected to purchase the trust property devised to Caroline Charles in her father's will, pursuant to the provisions of the Act of December 31, 1970, and Judge Montgomery's March 31, 1972, order. In addition, his Supplemental Order noted that the Tribe had effected a transfer of funds in the amount of $5,880.10 from its tribal account to the Special Deposits Account of the Morris Charles estate to satisfy the cost of purchase for the chosen property. This dollar figure coincided with a value given for the property in the March 31, 1972, Order Approving Will, computed as of the date of Morris Charles' death, November 23, 1964.

Caroline Charles died testate June 25, 1972. Her will, approved by order of February 12, 1974, named her son, Philip Brendale, one of the appellants, sole devisee of her property.

On July 17, 1974, Philip Brendale petitioned for reopening the Morris Charles estate alleging, inter alia, that it was an error

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fn. 1 (continued)
order having been issued, it has been incumbent on this Board to apply the law in effect even if this works to the detriment of the Yakima Tribe. The Department of the Interior does not have the authority to declare a federal statute unconstitutional. Estate of Benjamin Harrison Stowhy (Deceased Yakima Allottee No. 2455) and Estate of Mary G. Guiney Harrison (Deceased Colville Allottee No. S-925), 1 IBIA 269, 79 I.D. 428 (1972).

for the three-eighths interest in the Mary Charles Allotment inherited by his mother, Caroline Charles, to be purchased by the Yakima Tribe in 1972 for the value of the property prevailing at the date of Morris Charles' death, November 23, 1964. Appellant Brendale also raised this question in an action brought in federal court. 2/

By prior orders this Board has previously stated its conclusion that it was incorrect for the Examiner of Inheritance to permit the Yakima Tribe to purchase Caroline Charles' inherited three-eighths interest in the Mary Charles Allotment, devised to her by the will of Morris Charles, at the 1964 appraised value of the land.

[1] In the three decisions simultaneously issued by the Board on September 12, 1974, supra, remanding the captioned estates to an Administrative Law Judge for further proceedings, we held, and hereby reaffirm, that the proper valuation date for determining the fair market price to be paid by the Yakima Tribe for its purchase of all desired interests in the Mary Charles Allotment acquired by Caroline Charles, deceased, and presently, Philip

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2/ Appellant's civil action, filed in the United States District Court for the Eastern District of Washington, No. C-74-21, has been held in abeyance pending final administrative action regarding this controversy in accordance with a court-approved stipulation of parties filed July 1, 1974.

Brendale, should be May 12, 1972. Absent controlling guidelines in either the statutes or regulations concerning the selection of a valuation date, 3/ the Board concluded in its remand that it would be most equitable in this case to charge the Yakima Tribe for the value of the property as of the time of the Tribe's election to purchase. As previously noted, it was on May 12, 1972, that the Examiner of Inheritance decreed the Tribe's election to purchase the three-eighths interest in the Mary Charles Allotment which had been devised to Caroline Charles by Morris Charles. 4/

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3/ Implementing regulations concerning the Act of December 31, 1970, supra, were published on August 30, 1974, to be effective as of September 30, 1974 (39 FR 31635). See 43 CFR 4.300-4.317. The Board has not considered these regulations controlling in this case in view of its September 12, 1974, holding that the Yakima Tribe is authorized to purchase the subject interests in the Mary Charles Allotment for the fair market value determined as of May 12, 1972. As to Yakima tribal purchases determined to be subject to the above regulations, it is clear that fair market value is to be determined as of the date of a special hearing scheduled to determine value, after an appraisal and subsequent to the hearing determining heirs, or the date of any stipulation fixing the value. The appraisal must be made as of the date of the inspection of the property and the hearing determining value must be held within 6 months of that date; if it is not so held, a supplemental appraisal report is required.

4/ As there were no regulations in effect in 1972 explaining how a Tribe should accomplish an election for property under the 1970 Amendment, Judge Montgomery based his May 12, 1972, Supplemental Order on evidence that the Land Committee of the Yakima Tribe had voted to purchase Caroline Charles' trust properties at a meeting held April 27, 1972, and that on May 8, 1972, the Tribe effected a transfer of $5,880.10 from its Land Enterprise Account to the account of the estate.

Further, we stated in our remand that the Yakima Tribe's election to purchase the three-eighths interest in the Mary Charles Allotment from Caroline Charles, recognized by Judge Montgomery's May 12, 1972, Supplemental Order, should apply as well to her preexisting one-eighth interest in the Mary Charles Allotment which Caroline erroneously acquired from the 1959 probate of Cecelia Smith's will. 5/ Appellant Brendale contests this requirement on appeal because no such election took place in 1972, but this argument is rejected for the very reasons we imposed the requirement in our September 12, 1974, orders. In short, the evidence reflects that the Tribe should have been told of its right to purchase the one-eighth interest in 1972 and that if this had occurred, an election to purchase this additional interest would have been made at that time. 6/

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5/ A Modification Order, Nunc Pro Tunc, was entered in the Estate of Cecelia Smith (Borger) on June 13, 1975, by the Administrative Law Judge in response to the Board's September 12, 1974, instructions on remand. The Modification Order recites that Caroline Charles was not eligible under the Yakima Act of 1946 to inherit the one-eighth trust interest devised her by the decedent and in lieu thereof, Morris Charles is designated distributee of said property.

6/ The Tribe was first advised of its right to purchase the one-eighth interest in the Mary Charles Allotment possessed by Caroline Charles when Judge Montgomery entered his February 12, 1974, Order Approving Will in the Estate of Caroline Charles. Thereafter, on April 18, 1974, the Tribe effected a transfer of $6,683.78 from its Land Enterprise Account to the account of the Estate of Caroline Charles towards the purchase of the one-eighth interest. The amount deposited was based on a BIA valuation of the one-eighth interest as of the date of Caroline Charles' death, June 25, 1972.

On November 29, 1974, Judge Montgomery issued a notice of hearing in accordance with the Board's simultaneous orders of September 12, 1974. The hearing was held by Judge Montgomery on January 13, 1975, and was intended to resolve the issue of the fair market value to be paid by the Yakima Tribe for appellant Brendale's one-half interest in the Mary Charles Allotment. Judge Montgomery died subsequent to the hearing, and his successor, Robert C. Snashall, issued a final order on September 17, 1975, based upon the transcript of proceedings and other documents of record.

II. Fair Market Value

Judge Snashall's order of September 17, 1975, finds the total fair market value of appellant Brendale's interest in the Mary Charles Allotment, as of May 12, 1972, to be $40,000. Although Judge Snashall does not reveal in his order how this figure was reached, the Board has independently evaluated all testimony and exhibits which were before the Administrative Law Judge and we separately find that the fair market value totals $39,896. This value is determined from the following evidence:

First, it is apparent from the expert testimony provided at the hearing that the allotment in question is chiefly valuable

for its timber. The entire 160-acre tract consists of approximately 152 acres of ponderosa pine and 8 acres of lodgepole pine. The Bureau of Indian Affairs provided an appraisal of the merchantable timber and land, by way of an appraisal report dated November 20, 1973. This report furnished an appraised valuation of the property as of June 25, 1972, having been prepared prior to the Board's September 12, 1974, request for a BIA appraisal effective as of May 12, 1972. The fair market value quoted by the BIA for 80 acres as of the date cited was $26,756. Appellant Brendale produced an expert witness at the January 13, 1975, hearing, Ronald T. Munro, who presented a separate appraisal report for the fair market value of the merchantable timber only. Mr. Munro's report, dated July 31, 1974, calculates the property's timber value as of May 1972, using conversion tables commonly employed in timberland appraisals. For Mr. Brendale's 80-acre interest, Mr. Munro valued the merchantable timber to be worth $36,696.

[2] The above two appraisals differ in outcome primarily because the BIA appraisal computed less total volume of merchantable ponderosa pine as well as a lower stumpage value per board foot. The BIA estimate of timber volume was based on a prism cruise of the property in November 1971. Although the Board is aware of the fact that the BIA appraisal represents an official

report on behalf of the Department of the Interior, and not a study on behalf of any party, including the Tribe, we are not bound by whatever findings this report presents. Instead, the Board will give consideration to the complete record in arriving at its findings and determination. In the case at hand, the Board is persuaded that the most accurate appraisal of the fair market value for merchantable timber found on the Mary Charles Allotment was provided by Mr. Munro.

Mr. Munro concluded that in May 1972, there was a total merchantable timber volume of 1,305,600 board feet on the Mary Charles Allotment. Trees of less than 11 inches in diameter at breast height are excluded from this figure. Of this total, 1,237,072 board feet were derived from ponderosa pine which had a weighted average stumpage value of $58.32 per thousand board feet. For all timber species, Mr. Munro arrived at a total stumpage value on the subject property of $73,392 for the complete tract (160 acres). Dividing this total by one-half provides the timber value of $36,696 for Philip Brendale's interest, previously quoted. This sum is approximately $13,000 higher than the figure derived from the BIA appraisal for 90 acres.

Mr. Munro testified he was only qualified to appraise the timber value of the property and not the land itself. While the

land in question is chiefly valuable for its timber, it is obvious that timberland still holds some value once timber is cut. 7/ The BIA appraisal concluded that the land should be valued at $40 per acre above the appraised value for all merchantable timber and this value was not refuted by any convincing evidence. Accordingly, we add $3,200 land value to the $36,696 timber value and arrive at a final fair market value of $39,896 for an undivided one-half interest in the Mary Charles Allotment as of May 12, 1972.

III. Additional Procedures

Although the peculiar circumstances of this case have rendered existing regulations generally inapplicable to this proceeding (see footnote 2), the course the Board adopts in bringing this matter to a close generally coincides with the procedures set forth in 43 CFR 4.310 et seq. Specifically, it shall be ordered that within 20 days after the receipt of this decision by the Tribe, it must file with the Superintendent of the Yakima Indian Agency a specific list of all interests it elects to take from appellant Philip Brendale. It shall be conclusively presumed that the Tribe has released all

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7/ This is not the same as separately evaluating timber and land at the respective best uses of each. This objection was made by the Tribe with respect to other appraisals offered by appellant Brendale at the hearing.

claim to any interest not listed. The Tribe may decide that it does not want any of the property. If so, the Superintendent must be informed of such rejection within 20 days of receipt of this decision. In such event, the Tribe will be allowed full reimbursement for all money deposited toward the purchase of interests in the Mary Charles Allotment. The Tribe has thus far deposited a total of $12,563.88 toward the purchase of an undivided one-half interest. (See footnotes 4 and 6, supra.)

Within 1 year from the date of filing the formal election to take with the Superintendent, as above described, the Tribe shall be obligated to pay the balance due ($27,332.12 on the complete interest of appellant Brendale), plus interest on the unpaid balance at a rate of 8 percent per annum. 8/ The payment deadline may be extended for no more than two 6-month periods.

Administrative Law Judge Snashall shall retain jurisdiction of this matter for 2 years to oversee the necessary transactions and rule on any extension requests. Upon payment by the Tribe of the full fair market value for its interest, Judge Snashall, after

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8/ Although the Board's decision finds the date of taking of the subject property by the Tribe to be May 12, 1972, it would be inequitable to assess interest on the unpaid balance now established as of that date because of the extenuating circumstances in this case.

certification of said fact by the Superintendent, shall make a finding that the required fair market value has been paid and he shall issue a decision that the United States holds the title to such interest in trust for the Tribe.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the final order entered by Administrative Law Judge Robert C. Snashall on September 17, 1975, be, and the same is hereby modified in accordance with the terms herein prescribed.

This decision is final for the Department.

Done at Arlington, Virginia.

//original signed
Wm. Philip Horton
Member of the Board

We concur:

//original signed
Mitchell J. Sabagh
Administrative Judge

//original signed
Alexander H. Wilson
Administrative Judge